Petition

81-775

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No.

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,
PETITIONER,

v.

WILLIAM L. BUNNELL AND
KNUDSEN BROTHERS DAIRY,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

1. Whether a jointly administered trust fund, which was established pursuant to § 302 of the Labor-Management Relations Act and which is operated presently in accordance with the Employee Retirement Income Security Act of 1974, is a participant's "employer" or that employer's "successor in interest" within the meaning of the Veteran's Reemployment Rights Act.

2. Whether a jointly administered trust fund, which is neither a participant's "employer" nor that employer's "successor in interest," nevertheless must accept a contributing employer's statutory obligations by accepting that employer's contributions.

3. Whether a jointly administered trust fund, which is neither a participant's "employer" nor that employer's "successor in interest," forfeits its discretion to make pension eligibility determinations when it accepts contributions.

4. Whether a jointly administered trust fund, which prohibits a pensioner from working for an employer who is making contributions to the fund, can be ordered to pay a litigant benefits for periods during which the litigant worked for a contributing employer.

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v.

WILLIAM L. BUNNELL AND
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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Citations to Opinions Below.

The decision of the United States Court of Appeals for the First Circuit is reported at F.2d , 2 Employee Benefits Cases 1654 (1981), and is reproduced in Appendix A of this Petition (pp. 1a-4a).

The decision of the United States District Court for the District of Massachusetts is unreported but is reproduced in Appendix B of this Petition (pp.5a-20a).

Jurisdictional Statement.

The decision of the United States Court of Appeals for the First Circuit was issued on July 28, 1981. This Court has jurisdiction over the instant Petition pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provisions.

At issue is the meaning and application of the Veteran's Reemployment Rights Act and, more particularly, United States Code §§ 2021 and 2022 (Title 38) of same. The texts of §§ 2021 and 2022 are set out in Appendix C of this Petition (pp. 21a-24a).

Statement of the Case.

On September 6, 1974, William L. Bunnell filed with the New England Teamsters and Trucking Industry Pension Fund (hereinafter, "the Pension Fund"), a jointly administered, multiemployer pension fund, an application for a so-called minimum thirty-year service pension. Under the terms of the New England Teamsters and Trucking Industry Pension Plan (hereinafter, "the Pension Plan"), an employee's credited service is a compilation of his past and future service credit.

Future service credit is credit for periods of employment for which contributions from an employer are due and paid to the Pension Fund on behalf of an employee. Past service credit is credit for periods of employment with an employer prior to the time the employer becomes obligated to make contribu-

tions to the Pension Fund. An employee is given one year of past service credit for each year of employment in which he worked at least 135 days for one or more employers who subsequently became contributing employers. The 135-day requirement is measured by actual monies received by an employee during the year.

On April 17, 1975, Bunnell was advised by the trustees of the Pension Fund that he was not eligible for the thirty-year service pension because he did not have thirty years of credited service. In this regard, Bunnell was first employed by Brock Hall Dairy in May, 1944, and remained so employed until October, 1944, when he was inducted into the United States Army. Bunnell was honorably discharged from the Army in December, 1945, but subsequently reenlisted and remained a member of the Army until October, 1948. Thereafter, Bunnell was reemployed by Brock Hall Dairy and remained employed by said Company, or its successor in interest, Knudsen Brothers Dairy, until he retired on January 1, 1978.

In rejecting Bunnell's initial application in 1975, the trustees granted Bunnell future service credit for his employment with Brock Hall Dairy during the period 1958 to 1974, and past service credit for his pre-1958 employment with said employer. Additionally, under the terms of a 1970 vote, the trustees granted Bunnell past service credit for his first period of military service in the United States Army. However, in accordance with the rules of the Pension Plan, the trustees did not grant Bunnell past service credit for the period of his voluntary reenlistment, and, as a result, in 1975 Bunnell did not have the required thirty years of credited service. Subsequent to the trustees' decision, however, Bunnell continued to work for Knudsen Brothers Dairy and in January, 1978, retired and received a thirty-year service pension.

The instant action was commenced by the United States Attorney in the federal district court on behalf of Bunnell in ac-

cordance with 38 U.S.C. § 2022 and was heard by the court of appeals pursuant to 28 U.S.C. § 1291.

Reasons for Allowing the Writ.

In *NLRB* v. *Amax Coal Co.* 49 U.S.L.W. 4880 (1981), this Court enunciated and emphasized the division which does and must exist between a jointly-managed pension fund and contributing employers thereto. In this regard, this Court noted that prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the conduct of jointly-administered pension fund trustees was governed primarily by § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, and that under § 302 the duties of the trustees are "directly antithetical to that of an agent of the appointing party." *Id.* at 4883.

This Court went on to observe that "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet," and that "the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest." *Id.* In summation, the Court, quoting § 403(a) of ERISA, 29 U.S.C. § 1103(a), concluded that "ERISA vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union." *Id.*

Accordingly, in *Amax Coal Company*, this Court held that trustees must act solely on behalf of the participants or beneficiaries and, therefore must remain insulated from the influence of both the union and contributing employers. The decision of the Court of Appeals for the First Circuit herein is in direct conflict with the principles enunciated in *Amax Coal Company* in that the decision provides that the legal obligations of an employer are transferred to the Pension Fund by

the mere fact that the employer makes contributions to the Pension Fund. Thus, under the instant holding, the Pension Fund is made the agent or alter ego of Knudsen Brothers Dairy and thereby is prohibited from exercising its discretion in order to benefit all participants.

In this regard, the basis of the decision of the First Circuit below is set out in the following single paragraph:

> We do not find ourselves concerned with definitions of "employer," or whether Fund was independently controlled, or was Dairy's "successor in interest." Section 2021(a)(B)(i). We assume, in Fund's favor, that when, as a requirement of Dairy's collective bargaining agreement, it took over primary pension responsibilities for Dairy's employees in 1958, it need not have undertaken all pension obligations. It might, for example, have assumed responsibilities for future services only, viz., the employment years following the initiation of its agreement, provided there was no discrimination. Where, however, Dairy contracted for Fund to assume obligations for its employees' past services that treated returned veterans less favorably than its other employees, Dairy directly violated the Act. It must equally be a violation for Fund to participate, and apply Dairy's contributions to enure to the benefit of non-veteran employees and discriminate against veterans. As the district court put it, somewhat differently:
>
> > '[Dairy] has delegated all of its rights of control over retirement benefits to the Fund. The Fund must therefore accept [Dairy's] statutory obligations.'

(Appendix A to this Petition, p. 3a.) As is evident from the above, the First Circuit did not find that the Pension Fund

was Bunnell's pre-military "employer" or that employer's "successor in interest" and thus, directly liable under the Veteran's Reemployment Rights Act.

Rather, the First Circuit held that the Pension Fund was the alter ego of Knudsen Brothers Dairy and, by accepting contributions from the Company, the Pension Fund had accepted the Company's statutory obligations. This form of derivative liability eliminates the requisite division between employer and pension fund and prohibits the trustees of the instant Pension Fund from exercising their fiduciary duty to act in the interest of all the participants. Thus, the trustees are prohibited from determining how much, if any, unfunded liability should be permitted by the Pension Fund for voluntary, military reenlistments.

Accordingly, the Pension Fund submits that Bunnell's claim for pension credit for his voluntary, military reenlistment should have been determined based on the fiduciary standards established by § 302 of the Labor-Management Relations Act and ERISA and/or based on whether the Pension Fund can be considered Bunnell's pre-military "employer" or that employer's "successor in interest" within the meaning of the Veteran's Reemployment Rights Act. However, the First Circuit found the decision of the trustees of the Pension Fund to be "*per se* unlawful" (*see* Appendix A to this Petition, p. 4a, n.3) based upon the above-described assumption of liability theory. The Pension Fund respectfully submits that said theory conflicts with the separation principles recently set out by this Court in *Amax Coal Company* and respectfully urges that this Court allow the instant writ to resolve that conflict.

In addition, while the First Circuit did not reach the issue of whether the Pension Fund is Bunnell's pre-military "employer" or that employer's "successor in interest," that issue already was raised and argued below and represents an "important question of federal jurisdiction which has not been, but should be, settled by this Court," given the ever in-

creasing number of veterans and the significant role jointly administered pension funds play in the provision of retirement benefits.

In this regard, the provisions of the Veterans's Reemployment Rights Act which are implicated herein had their genesis in the Selective Training and Service Act of 1940. 54 Stat. 885. While the primary concern of Congress in enacting the Selective Training and Service Act of 1940 was the mobilization of American forces, Congress did see through that Act to forestall the type of widespread unemployment of returning servicemen that had occurred subsequent to World War I by requiring both public and private employers, absent unusual circumstances, to reemploy servicemen who met certain conditions. *See* Act of 1940, § 8(b) and (c). To enforce this reemployment requirement, Congress, in the Act of 1940, also provided federal courts with jurisdiction to hear claims involving any failure by an employer to reemploy a serviceman. *See id.* at § 8(e).

While the Act of 1940 was reenacted and amended several times, *see, e.g.*, Universal Military Training and Service Act of 1948, 62 Stat. 604, *codified at* 50 U.S.C. App. §§ 451-67 (Supp. V, 1969); Vietnam Era Veterans' Readjustment Assistance Act of 1974, 88 Stat. 1594, Congress left substantially unchanged the reemployment requirement of the Act of 1940 as well as the federal jurisdictional grant therein. Thus, in relevant part, § 2021 of Title 38 sets out the following reemployment requirement:

> (a) In the case of any person who is inducted into the Armed Forces of the United States . . . and who leaves a position . . . in the employ of any employer in order to perform such training and service . . .
>
> > (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall —

> (i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; . . .
>
> (b)(i) Any person who is restored to or employed in a position in accordance with the provisions of clause . . . (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . . .

Similarly, § 2022 of Title 38, which provides, in relevant part, as follows, carries forward the federal jurisdictional grant which was first set out in the Act of 1940:

> If an employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of § 2021(a), (b)(1), or (b)(3), or § 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

As quoted above, the Veteran's Reemployment Rights Act is at the same time both quite broad and quite narrow. The Act is broad in that Congress requires that an employer not only restore a retiring veteran to a position of like seniority, status and pay as that of his former position, but also allow the veteran to participate "in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence."

The Act is narrow, however, in that it involves only those rights and benefits which the employer *qua* employer controls and provides. Thus, for example, the Act's jurisdictional grant provides that the United States District Courts "shall have the power ... to require [an] *employer* to comply with [the reemployment] provisions" of the Act (emphasis supplied).

In the instant case, Bunnell invoked the jurisdiction of the federal court under § 2022 and alleged that *both* Knudsen Brothers Dairy and the Pension Fund failed to comply with the reemployment provisions of § 2021. It is beyond peradventure, however, that the Pension Fund was never Bunnell's employer. Thus, while the Pension Fund regularly employs employees who administer the Pension Plan and who could demand from the Pension Fund the reemployment rights set out in § 2021, the record is devoid of any facts which in any way suggest that Bunnell ever performed services for or was ever controlled by the Pension Fund in his performance of his work. Accordingly, it is evident that the Pension Fund is not Bunnell's "employer" as that term is ordinarily defined. *See NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 117-118 (1944), where this Court, in upholding the determination of the National Labor Relations Board that newsboys were "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, noted that "[i]n addition to effectively fixing the compensation, [the publishers] in a variety

of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work."

Furthermore, while § 2021 extends liability to the "successor in interest" of a veteran's premilitary employer, it is self-evident, and it has been agreed, that Knudsen Brothers Dairy rather than the Pension Fund is the "successor in interest" of Brock Hall Dairy, the premilitary employer of Bunnell. In this regard, there is no evidence that the Pension Fund, at any time subsequent to 1958, ever succeeded to any interest of Brock Hall Dairy or Knudsen Brothers Dairy. Thus, there is no claim that Brock Hall Dairy or Knudsen Brothers Dairy at any time transferred a trust corpus to the Pension Fund or otherwise transferred assets to the Pension Fund other than the contributions required by the collective bargaining agreements. As such, the Pension Fund can no more be characterized as the "successor in interest" of Knudsen Brothers Dairy than could Blue Cross/Blue Shield be characterized as an employer's "successor in interest" simply because the employer made premium payments on behalf of its employees to the organization.

In interpreting the meaning of a statute or a statutory word or phrase, this Court has admonished that generally words are to be given their established meaning in the absence of persuasive reasons to the contrary. *See, e.g., NLRB* v. *Amax Coal Co., supra* at 4882; *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 184 n.29 (1978); *Burns* v. *Alcala*, 420 U.S. 575, 581 (1975).

In this regard, there is nothing in the statutory language of the Reemployment Act or the legislative history of the Act of 1940 or any of the Act's amending or reenacting legislation to indicate that Congress ever intended to effect through that Act or its progeny the relationships between a retiring veteran and any individual, organization, or association other than that veteran's premilitary employer or its agent or successor in in-

terest, as same are ordinarily defined. *See, e.g.*, 86 Cong. Rec. 10760-763; 1974 Code Cong. and Adm. News 6313, 6343-44; 1948 U.S. Code Cong. and Adm. News 1989, 2003-05.

In sum, while this Court has addressed questions which have arisen out of certain ambiguities contained in § 2021, including the question of what rights are protected aspects of "seniority," *see, e.g.*, *Coffey* v. *Republic Steel Corp.*, 447 U.S. 191 (1980); *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977); *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975); *Accardi* v. *Pennsylvania Railroad Co.*, 383 U.S. 225 (1966); *Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964); *McKinney* v. *Missouri-K.-T. R. Co.*, 357 U.S. 265 (1958), there never has been any legislative or judicial indication that the terms "employer" or "successor in interest" as contained in the Act should be accorded anything other than their ordinary meaning. Therefore, it is clear that the Pension Fund is not an "employer" or a "successor in interest" within the meaning of § 2021 of the Act, and should not be held by the courts to a per se standard which requires that it grant pension credit to veterans for all military service regardless of the impact that granting same would have on the nonveteran participants in the Pension Fund.

Finally, in its opinion below, the First Circuit also rejected the Pension Fund's argument that Bunnell was not entitled to benefits from 1975 to 1978 since he continued to work for a contributing employer. Specifically, the court concluded that "[b]ut for the unlawful refusal to pay, plaintiff would not have worked the additional three years." While the record would suggest that the court's conclusion was erroneous,[1] the important federal question is whether a court can order the trustees of a pension fund to violate a provision of the relevant

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[1]Mr. Bunnell was only forty-seven in 1975.

pension plan when that provision is authorized specifically by statute. *See* 29 U.S.C. § 1053(a)(3)(B).

Conclusion.

For the reasons set out in detail above, the New England Teamsters and Trucking Industry Pension Fund respectfully urges that this Court grant the instant writ.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 80-1281

WILLIAM L. BUNNELL,

PLAINTIFF, APPELLEE,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

DEFENDANT, APPELLANT,

and

KNUDSEN BROTHERS DAIRY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge.*]

Before COFFIN, *Chief Judge,*
ALDRICH and BREYER, *Circuit Judges.*

Gabriel O. Dumont, Jr., with whom *James T. Grady*, and *Grady and McDonald, P.C.* were on brief, for appellant.

Michael Jay Singer, Attorney, Civil Division, Department of Justice, with whom *Edward F. Harrington*, United States Attorney, *Thomas S. Martin*, Acting Assistant Attorney General, and *Robert E. Kopp*, Attorney, Civil Division, Department of Justice, were on brief, for appellee William L. Bunnell.

July 28, 1981

ALDRICH, *Senior Circuit Judge.* In May, 1944 plaintiff Bunnell became a non-temporary employee of Dairy.[1] In October,

[1] Defendant Knudsen Brothers Dairy is the successor to plaintiff's initial employer, Brock Hall Dairy. The change is irrelevant.

1944 he was inducted into the Army. By arrangement, he received an honorable discharge on December 18, 1945 and voluntarily enlisted the next day, serving until October 28, 1948, when he was permanently honorably discharged. Within thirty days he was re-employed by Dairy, remaining there until he sought early retirement and his "minimum thirty year service pension," to commence May 1, 1975. Pursuant to an industry-wide collective bargaining agreement Dairy had been contributing to defendant New England Teamsters and Trucking Industry Pension Fund (Fund). Plaintiff was a recognized employee thereunder, and, concededly, would have been entitled to the thirty year pension had his entire term of enlistment been counted. A specific provision of the Plan, however, recognized wartime service as equivalent to employment, but did not cover plaintiff's post V.J. Day period of voluntary enlistment.[2]

The statute upon which plaintiff relies for charging Fund with his full service years, known as the Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-2026, generally requires an employer to accord to employees returning from military

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[2] The pertinent provisions were as follows:

"*Past Service*

"The term 'Past Service' shall mean periods of Covered Employment for which Past Service Credit is granted in accordance with Article III hereof." Article I, Section 9.

"*Basis Of Credit For Past Service*

"Each employee shall be given a year of credit for each year of employment prior to the First Contribution Year in which he worked at least 135 days for one or more employers who became Contributing Employers, provided such employment was in a job classification and at a place of business covered by a collective bargaining agreement then in effect between a Local Union and an employer who subsequently becomes a Contributing Employer . . . unless otherwise provided herein. . . ." Article III, Section 2.

"*Past Service Credit For Certain Active Military Service.*

"Past Service Credit shall be granted for periods of active military service during World War II and the Korean Conflict. . . ." Article III, Section 6.

service full benefits that would have been their due had they remained in their employment, including seniority and pension rights. *Alabama Power Co.* v. *Davis*, 1977, 431 U.S. 581. This obligation applies to voluntary enlistees as well as inductees. Section 2024(a). Non-acceding employers may be sued in the federal court. Section 2022. Fund, however, objects to being added as a defendant, claiming, first, that it is not an employer. The district court, after an elaborate analysis, found that it was an employer, and ruled that as between it and Dairy its liability was primary, to include retroactive pension benefits for all of plaintiff's military service by virtue of the Act. Fund appeals.

We do not find ourselves concerned with definitions of "employer," or whether Fund was independently controlled, or was Dairy's "successor in interest." Section 2021(a)(B)(i). We assume, in Fund's favor, that when, as a requirement of Dairy's collective bargaining agreement, it took over primary pension responsibilities for Dairy's employees in 1958, it need not have undertaken all pension obligations. It might, for example, have assumed responsibilities for future services only, viz., the employment years following the initiation of its agreement, provided there was no discrimination. Where, however, Dairy contracted for Fund to assume obligations for its employees' past services that treated returned veterans less favorably than its other employees, Dairy directly violated the Act. It must equally be a violation for Fund to participate, and apply Dairy's contributions to enure to the benefit of non-veteran employees and discriminate against veterans. As the district court put it, somewhat differently:

> "[Dairy] has delegated all of its rights of control over retirement benefits to the Fund. The Fund must therefore accept [Dairy's] statutory obligations."

The short remedy is to eliminate any purported limitation to the Plan disfavoring veterans.[3] The question is not what Fund and Dairy contracted, or what was their relationship; the statute overrides contracts. As the Court said in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275, at 285,

> "This legislation is to be liberally construed. . . . [N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."

We find no difficulty in fashioning this remedy, or in the concept that suit may be brought directly against Fund. *Cf. Smith* v. *Industrial Employers & Distributors Ass'n*, 9 Cir., 1976, 547 F.2d 314, *cert. denied*, 431 U.S. 965.

We deal briefly with Fund's contention that since, when he was wrongly told in 1975 that his minimum pension was not earned, plaintiff continued to work until 1978 to complete the additional three years claimed to be necessary, he is not entitled to a pension for that period. Fund's brief observes, by way of introduction, that the provisions of the Veterans' Reemployment Rights Act "had their genesis in the Selective Training and Service Act of 1940." Quite apparently Fund relies too much on the Book of Genesis. The fact that Laban was able to maneuver Jacob into serving a second seven years for Rachel, Genesis, Chapter 29, does not mean that we should endorse a similar course. Plaintiff had earned, and is entitled to, the sought retroactive payments. But for the unlawful refusal to pay, plaintiff would not have worked the additional three years.

Affirmed.

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[3] Fund's claim that plaintiff might have an action at law "to challenge, as unreasonable, a pension plan regulation which denies past service credit for periods of voluntary reenlistments," 29 U.S.C. § 186; *Rueda* v. *Seafarers Int'l Union*, 1 Cir., 1978, 576 F.2d 939, is no answer. Reasonableness is not at issue; the exclusion was per se unlawful.

Appendix B.

United States District Court
District of Massachusetts

WILLIAM L. BUNNELL,
Plaintiff

V.

Civil Action
77-2616-MA

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND and KNUDSEN BROTHERS DAIRY,
Defendants

Memorandum and Order

Mazzone, D.J. March 18, 1980

This action was commenced by the United States Attorney on behalf of the plaintiff, William L. Bunnell. The case arises out of the refusal of the defendants, Trustees of the New England Teamsters and Trucking Industry Pension Fund (Fund), and Knudsen Brothers Dairy (Knudsen), to credit Bunnell for his period of service in the armed forces for purposes of determining his pension rights. Jurisdiction is properly invoked under the Veteran's Reemployment Rights Act (Act), 38 U.S.C. §2021, *et seq.* The parties have filed an agreed statement of facts.

The plaintiff, Bunnell, was first employed by the Brock Hall Dairy on or about May 26, 1944. He remained there until he was inducted into the Army on October 27, 1944. He was

honorably discharged on December 18, 1945, for the convenience of the Government in order to enlist voluntarily on December 19, 1945. After almost three years, he was again honorably discharged on October 28, 1948. Within thirty days, he went back to work for the Brock Hall Dairy. He continued to work for Brock Hall until April 26, 1974, when it was bought by Knudsen. Bunnell worked for Knudsen until he retired on January 1, 1978.

In 1949, Local 677 of the Teamsters Union began to represent Brock Hall employees, including the plaintiff. In 1958, the Fund adopted the Pension Plan under which Bunnell seeks past service credit for all four years of his military service. In 1970, Section 6, "Past Service Credit for Certain Active Military Duty" was added to Article III of the Pension Plan Rules and Regulations. Under Section 6, an employee received credit in computing pension benefits for time spent in active military duty during World War II. The Trustees have consistently interpreted this provision to deny past service credit for voluntary re-enlistment after V-J Day.

On September 6, 1974, Bunnell filed an application with the defendant Fund for a "minimum thirty year service pension." He was informed that he would not be awarded past service credit for his three years' voluntary military service between 1945 and 1948, and, therefore, he did not have the minimum thirty years of credited service necessary to retire. If he had received credit for the total time served in the military, he would have been eligible for a thirty year pension as of December, 1974. Because the Fund refused to credit his voluntary military service, Bunnell did not retire until January 1, 1978. He claims that under the Act, he should have received past service credit for his three years' voluntary re-enlistment. He instituted this action on August 29, 1977 against the Fund and Knudsen seeking monthly payments under the thirty year pension plan retroactive to May 1, 1975.

The matter is before the Court on the plaintiff's motion for summary judgment and the motion of the Fund to dismiss for failure to state a claim. The Fund argues that Bunnell's federal statutory right does not entitle him to receive past service credit under the terms of the pension plan because the Fund is an independent third party, not an employer subject to the Act. Knudsen opposes plaintiff's motion for summary judgment on the grounds that it would be "inequitable" to hold Knudsen liable for pension payments due under the Act because Knudsen paid all required premiums to the Fund and had no control over the Fund's denial of benefits.

The first question is Bunnell's entitlement to past service credit under the Act for his three years of voluntary reenlistment. A person who wishes to resume his former employment after being inducted into the Armed Forces and satisfactorily completing military service must be rehired by his former employer, or the employer's successor in interest, to his former job or a comparable one. 38 U.S.C.§2021(a)(2)(B)(i). Benefits are equally available to voluntary enlistees and to those inducted by draft. 38 U.S.C. §2024(a). The Act provides:

> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

> (2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such persons' restoration to such employment, or reemployment.

38 U.S.C. §2021(b). The returning employee is entitled to all employment benefits as though he had never been gone. *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U.S. 275, 284-285 (1946).

Pension benefits by their nature are perquisites of seniority protected under Section 2021 and a veteran's total time in the military must be credited under an employer's pension plan. *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). The method of crediting service for purposes of determining eligibility for pension benefits in *Alabama Power* is nearly identical to the method involved here. The "true nature" of pension payments is a reward for length of service. 431 U.S. at 593; *see, Beckley* v. *Lipe-Rollway Corporation*, 448 F.Supp. 563 (N.D.N.Y. 1978). Thus, Bunnell has a right under the Act to receive credit for all his military service time when his length of service in employment is computed.

The difficult question in this case is from whom Bunnell can obtain such credit: whether the Fund is subject to the Act, although it is not Mr. Bunnell's employer in the traditional sense, and whether Knudsen can be held liable to pay amounts due under the Act, although it has delegated its pension-paying function to the Fund through a collective bargaining agreement.

The Fund relies on the language of two provisions of the Act to argue that the statute creates rights in an employee only against his immediate employer. The Act states that a veteran who previously worked for a private employer must "be restored by such employer or the employer's successor in interest" to his former position or "to a position of like seniority, status and pay . . . unless the employer's circumstances have so changed as to make it impossible to do so." §2021(a). Thus, the Act explicitly imposes an affirmative duty only upon the "employer." That term is not defined in the Veteran's Reemployment Rights Act.

The Fund also relies on Section 2022, which creates a private right of action. That section provides in pertinent part:

> If any employer . . . fails or refuses to comply with the provisions of section 2021(a) . . . the district court . . . shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action . . . In any such action only the employer shall be deemed a necessary party respondent.

The Fund argues that this Court is without jurisdiction to entertain plaintiff's claim against it under Section 2022 because the statute authorizes the court only "to require such *employer* to comply . . ." (emphasis added). The Fund asks us to construe "employer" narrowly, allowing Bunnell to obtain relief only from Knudsen, and so to hold the Act imposes no obligation on a pension fund to accord to a veteran the retirement benefits he would be entitled to receive if he drew his pension

directly from his employer, where the fund which is established for the benefit of employees pursuant to a collective bargaining agreement is maintained by employers' contributions and is controlled by an independent board of trustees.[1]

First, Bunnell's right to past service credit under the Act cannot be defeated by the collective bargaining agreement between the two parties from whom he seeks relief:

> To be sure, a veteran's right to reemployment cannot be defeated by entering into inconsistent contractual obligations with a third party. *Moe* v. *Eastern Air Lines, Inc.*, 246 F.2d 215, 221 (5th Cir. 1957), *cert. denied*, 357 U.S. 936, 78 S.Ct. 1380, 2 L.Ed.2d 1550 (1958); *Trusteed Funds, Inc.* v. *Dacey*, 160 F.2d 413, 420 (1st Cir. 1947); *United States ex rel. Stanley* v. *Wimbish*, 154 F.2d 773 (4th Cir. 1946); *Salter* v. *Becker Roofing Co.*, 65 F.Supp. 633, 636 (M.D.Ala. 1946).

Mowdy v. *Ada Board of Education*, 440 F.Supp. 1184, 1192 (E.D. Okla. 1977); *see also*, *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. at 285; *Palmarozzo* v. *Coca-Cola Bottling Co. of New York, Inc.*; 490 F.2d 586, 592 (2nd Cir. 1973), *cert. denied*, 417 U.S. 955 (1974); *Beckley* v. *Lipe-Rollway*, 448 F.Supp. at 566, 567. Therefore, Knudsen cannot be excused by the collective bargaining agreement from fulfilling its obligations under the Act as an employer. Knudsen cannot contract away the veteran's statutory rights but it may effectively transfer all of its duties and rights as an employer with respect to its pension-paying functions. Although the Act imposes liability on employers in the first instance, it is pos-

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[1] *See*, Labor Management Relations Act, 1947, §302(c)(5), 29 U.S.C. §186(c)(5) (purpose and regulation of employee trust funds).

sible that the Fund is Knudsen's "successor in interest" within Section 2021 for the limited purpose of determining and paying retirement benefits.

The language of the Act, its legislative history, and cases decided under it demonstrate that it is to be interpreted broadly. Section 2021(b)(2), quoted *supra*, leaves no question as to Congress' intent to assure that a veteran is not to be penalized for serving the country. In the *Alabama Power* case, the Supreme Court declared that a guiding principle for any interpretation of the Act was that:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need . . ."

431 U.S. at 584, quoting *Fishgold* v. *Sullivan Drydock & Repair*, 328 U.S. at 285. *See also, Cohn* v. *Union Pacific Railroad Co.*, 427 F.Supp. 717 (D.Neb. 1977), *aff'd*, 572 F.2d 650, *cert. denied*, 439 U.S. 836 (1978); *Schaller* v. *Board of Education of Elmwood Local School District*, 449 F. Supp. 30 (N.D. Ohio 1978).

The breadth of the Congressional mandate is underscored by the authority conferred by Section 2022 of the Act on district courts to fashion broad equitable remedies and on officials of the executive branch to aid a veteran in enforcing employment rights:

> The district court . . . shall have the power . . . specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits

> provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar . . . [T]he United States Attorney . . . if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits.

Actions under this section are equitable in nature. *Goodman* v. *McDonnell Douglas Corp.*, 456 F.Supp. 874 (E.D.Mo. 1978), *aff'd*, 606 F.2d 800 (1979). Remedies are to be fashioned so as to provide uniform results under the Act. *Peel* v. *Florida Department of Transportation*, 443 F.Supp. 451, 460 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (1979). Thus, this Court has a duty to provide a veteran with complete relief.

It is against this backdrop of broad legislative purpose and judicial discretion that we assess the merits of the Fund's argument that it has no duty to comply with the Act. First, addressing the effect of Section 2022's provision that "only the employer shall be deemed a necessary party respondent," we conclude on the basis of legislative history and the plain meaning of the language that a plaintiff veteran is not barred from bringing an action against anyone other than the immediate employer. The provision was tacked on to the original 1940 veterans' rights statute by the Selective Service Act of 1948, ch. 625, Pub.L. No. 759, Title l, §9(d), 80th Cong., 2d Sess., U.S. Code Cong. & Adm. News 630. The purpose of the addition was to make "technical . . . changes to bring the section more in line with judicial interpretation." 1948 U.S. Code

Cong. & Adm. News 1989, 2004; Sen.Rep. No. 1268, Part VI, §9(d). Prior to the amendment, defendant employers could move to implead or join unions, pension funds and employees situated similarly to the plaintiff, or they could move to dismiss for veteran's failure to join such parties, Fed.R.Civ.P. 19(b). If those parties had been *necessary*, individual veterans would have been greatly discouraged by the cumbersomeness and expense of litigation from asserting meritorious claims.

However, the fact that the Fund is deemed an unnecessary party to Bunnell's action under §2022 does not mean that it is an improper or impermissible party to the action. Rather, the "necessary party" language allows the plaintiff the choice of whether to sue anyone other than his immediate employer, such as his union or pension fund. It also deprives the employer of the right to bring in such parties or dismiss the action, although they might otherwise be found to be necessary under Rule 19(a) due to their interest in the result of the suit.

This interpretation is supported by the number of suits under the Act where unions have been allowed to participate as defendants, both before and after the "necessary party" language was added. In the *Fishgold* case, 328 U.S. 275, the union was a proper party because of the potential conflict between the statute and its collective bargaining agreement in awarding various benefits on the basis of length of service. *See also, Oakley* v. *Louisville & Nashville Railroad Company*, 338 U.S. 278 (1949) (union was allowed to intervene); *Payne* v. *Wright Aeronautical Corporation*, 162 F.2d 549 (3rd Cir. 1947) (employer impleaded union; seniority provisions of collective bargaining agreement which discriminated against returning veterans in violation of the Act were held unenforceable against such employees); and *Conner* v. *Pennsylvania Railroad Company*, 177 F.2d 854 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 919 (1950) (railroad employees' union was a party to the action so individual employees who would

be adversely affected by the decision were not indispensable parties).

The more recent case of *Smith* v. *Industrial Employers and Distributors Association*, 546 F.2d 314 (9th Cir. 1977), *cert. denied*, 431 U.S. 965, supports our conclusion that Section 2022 does not preclude Bunnell from suing the Fund. In the *Smith* case, which arose under the Veteran's Reemployment Rights Act, both the veteran's employer and the union which administered his pension plan were named as defendants, and relief was ordered primarily from the union by way of awarding the veteran past service credit under the pension plan for military service. Thus, the administrator of the pension plan, in this case a union, rather than an independent fund, was a proper party defendant.

Having concluded that jurisdiction over the Fund is not precluded by the "necessary party" language, we next address the question of whether the Fund is an "employer" or "successor in interest" within the Act, and is subject to this Court's jurisdiction under Section 2022. The Fund asserts that we should construe "employer" to include only one to whom the veteran provides services and from whom he receives wages.[2] Bunnell argues that Knudsen, his employer in the traditional sense, has delegated certain aspects of the employment relationship, *i.e.*, determination of pension eligibility and administration of the pension program, to the Fund, and that the Fund is therefore an employer under the Act for the purpose of providing returning veterans with the incidents of employment over which the Fund has control.

We agree that a pension trust fund may be an employer under the Act insofar as it determines eligibility and pays benefits, and must be held subject to the responsibility of an

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[2] As discussed above, pension payments are a reward for length of service rather than deferred wages. *Alabama Power*, 431 U.S. at 593.

employer in performing those functions. Otherwise, veterans whose pensions were administered by trust funds would be at a disadvantage compared to those whose immediate employers directly provide retirement benefits. They would have to sue their employers to recover any entitlement not specifically provided by the pension fund under a collective bargaining agreement. Congress could have intended no such disparity in treatment.

A careful examination of the fact in this case supports the conclusion that the defendant Fund is an employer. It does not merely make payments as they become due. To the contrary, its board of trustees exercises complete control over payments, setting standards for employee eligibility, determining whether a new employer may participate in the Fund, establishing the rate of contribution due from Knudsen and other "contributing employers," and investing the capital generated by the contributions so as to enable the Fund to meet its obligations to employees. No single contributing employer exercises any direct control over the Fund's activities; as a group, they elect four of the eight trustees. The other four are elected by the approximately twenty participating locals. Knudsen is without authority to make the Fund pay Bunnell amounts to which he is entitled under the Act but not under the Fund's Rules and Regulations. The trustees have broad discretion to amend the terms of the plan without approval of contributing employers. Contributors must sign a "Standard Form of Participation Agreement" which may subsequently be unilaterally modified by the trustees. From this arrangement we infer that the parties to the collective bargaining agreement contemplated that a covered employee would receive all of his pension benefits from the Fund. Knudsen has delegated all its rights of control over retirement benefits to the Fund. The Fund must therefore accept Knudsen's statutory obligations.

Although the Veteran's Reemployment Rights Act does not define "employer," legislation in related areas of labor law provides support for finding that a pension fund may be defined as the recipient's employer. Under the definitions of the Employee Retirement Income Security Act of 1974 (ERISA), and its predecessor, the Welfare and Pension Plans Disclosure Act, the Fund could be considered Bunnell's employer. 29 U.S.C. §§1002(5), 1002(9); 29 U.S.C. §§301(a)(4), 301(a)(8) (repealed in 1975 by ERISA). ERISA provides:

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity . . . (9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. §1002.

Similarly, under Title VII of the 1964 Civil Rights Act, labor unions, trustees and trusts may come within the statutory definition of "employer." 42 U.S.C. §§2000e(a) and (b).

The Supreme Court has adopted a broad definition of the employment relationship for purposes of the National Labor Relations Act, 29 U.S.C. §151 *et seq.* In deciding whether newsboys were "employees" or independent contractors, the Court rejected the narrower common law definition:

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance

of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service." On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding the "employers and employees not in proximate relationship may be drawn into common controversies by economic forces," and that the very disputes sought to be avoided might involve "employees [who] are at times brought into an economic relationship with employers who are not their employers." In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

N.L.R.B. v. *Hearst Publications, Inc.*, 322 U.S. 111, 128-29 (1944) (footnotes and citation omitted).

The Fund refers to interpretations of Section 501(b) of Landrum-Griffin Act, 29 U.S.C. §501(b), in arguing that the Fund is misjoined because plaintiff's complaint fails to state a claim for relief against it. Under that statute, which permits suits only against "any officer, agent shop steward, or representative of a labor organization," local unions and an international union were not properly joined as defendants. *Sabolsky* v. *Budzanoski*, 475 F.2d 1245 (3rd Cir. 1972), *cert. denied*, 409 U.S. 853. However, the Landrum-Griffin Act

specifies carefully the individuals who may properly be sued. Clearly, a local or international union is an organization, and therefore cannot be an "officer," "steward" or "representative." The language of the Veteran's Reemployment Rights Act is not so restrictive. An "employer" or "successor in interest" is not specifically defined and may be an individual, a corporation or some other type of organization. Defendant's analogy is, therefore, unpersuasive. The Fund has provided us with no statute which defines "employer" so as to exclude trusts such as itself.

Equitable considerations also favor subjecting the Fund to the Act. The trustees drafted the offensive Section 6 in 1973, frustrating the broad and clearly stated purposes of the Act, which has remained essentially unchanged since 1948. Knudsen did not participate in drafting the regulation. If the Fund were not required to comply with the statute, an employer would either have to drop out of the Plan and provide retirement benefits directly in order to control the terms of eligibility, or reimburse veterans in Bunnell's position in a piecemeal fashion for the difference between amounts provided by a union's pension plan and amounts due under the statute. Either course of action would undermine the integrity of collective bargaining agreements and so frustrate federal labor policies. Further, this Court's remedial powers are broad under Section 2022, and holding the Fund liable is necessary to obtain a uniform result in allowing a veteran to recover his full statutory entitlement to pension payments from the entity which determines and pays his pension, be it an immediate employer or a trust fund to which the employer has delegated its pension functions.

Finally, we reach the issue of whether primary liability should rest on Knudsen or the Fund. Some of the factors discussed above are relevant here: Knudsen's lack of fault or

control;[3] the Fund's control of payments and eligibility determinations; and the difficulty of administering a piecemeal approach where individual employers make up the difference. It also would be inequitable to hold Knudsen liable for a pension policy over which it had no control when it has paid all the monies it earmarked for pension benefits over to the Fund. If Knudsen could sue the Fund under its agreements with the union or Pension Fund trustees for breach of their obligation to pay full pension benefits, we would foment needless litigation by placing primary liability on Knudsen. Finally, although this plaintiff could obtain complete relief from Knudsen because his claim is now for a fixed sum, in order to protect younger veterans, we must hold that the Fund is subject to the Act and that Section 6 is unenforceable insofar as it conflicts with the Act.

Smith v. *Industrial Employers and Distributors Association* 546 F.2d 314, supports our conclusion, although the defendant Association, which was designated by the union to administer the pension plan, apparently did not raise the issue of whether it was an "employer for purposes of jurisdiction and liability under the Act. The defendant employer there, as here, made contributions under a collective bargaining agreement to a pension plan. There the plan was established by the collective bargaining agreement, and may therefore have been subject to greater control by contributing employers. It denied any credit for military service in computing retirement benefits. The Court held that time spent in the military must be included in computing length of service, implying that it thus awarded Smith equitable relief against the administrator of the pension plan rather than against his employer.

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[3] An employer's good faith may provide a defense to a veteran's claim under the Act. *See, e.g., Mowdy* v. *Ada Board of Education*, 440 F.Supp. 1184.

EEOC v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978), does not lead to the opposite result. The Court of Appeals rejected an employer's argument that sole liability for sex discrimination in the terms of a contributory pension plan rested with the administrator of the plan, an insurance company. There, however, the employer had determined the offensive pension formula which required women to pay higher premiums. Moreover, we do not here decide that Knudsen would not be liable if relief were unavailable from the Fund. We hold only that the appropriate remedy under all the circumstances is that the Fund compute service credit for veterans in accordance with the Veteran's Reemployment Rights Act rather than pursuant to Section 6 of its Rules and Regulations when the two conflict, and that it award Bunnell retroactive pension payments on the basis of that computation.

We reject the Fund's contention that Bunnell sustained no compensible loss because he continued to work from the time when he was wrongfully denied benefits in 1974 until he became eligible under the Fund's Rules and Regulations in 1978. According to the defendant's theory, the plaintiff would have had to quit and sue in 1974, then, if he ultimately lost after pursuing litigation (which required three years in this case) while receiving no income, he would have to return to work for another three years in order to qualify for the thirty year pension. Because Bunnell chose to continue working, he lost three years of valuable free time and the pension payments which reward length of service. Such benefits are compensable under Section 2022, and may not be offset by the Fund against wages paid by Knudsen for the plaintiff's services.

In accordance with the foregoing, the defendant Fund's motion to dismiss must be denied and the plaintiff's motion for summary judgment is allowed.

SO ORDERED.

/s/ A. David Mazzone

United States District Judge

Appendix C.

38 USC — VETERANS' BENEFITS

§ 2021. Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approxima-

tion thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to

participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

§ 2022. Enforcement procedures

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024,

the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

Opposition

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-775

In the Supreme Court of the United States

OCTOBER TERM, 1981

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, PETITIONER

v.

WILLIAM L. BUNNELL AND KNUDSEN BROTHERS DAIRY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT BUNNELL IN OPPOSITION

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QUESTION PRESENTED

Whether respondent Bunnell, a reinstated veteran entitled under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, to three years' credit toward his pension benefits for time spent in military service, may obtain appropriate relief from petitioner, a multi-employer pension fund that administers the pension plan for Bunnell's employer pursuant to a collective bargaining agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-775

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, PETITIONER

v.

WILLIAM L. BUNNELL AND KNUDSEN BROTHERS DAIRY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT BUNNELL IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 655 F. 2d 451. The opinion of the district court (Pet. App. 5a-20a) is reported at 486 F. Supp. 714.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1981. The petition for a writ of certiorari was filed on October 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, are set forth in Appendix C to the petition (Pet. App. 21a-24a).

STATEMENT

1. Respondent William L. Bunnell was first employed in a non-temporary position by Brock Hall Dairy, predecessor of respondent Knudsen Brothers Dairy, in May 1944 (Pet. App. 1a, 5a). He remained in that position until October 1944, when he was inducted into the United States Army (*id.* at 1a-2a, 5a). Bunnell received his honorable discharge on December 18, 1945, for the convenience of the government, and enlisted voluntarily in the Army the following day (*id.* at 2a, 5a-6a). He again served in the military for almost three years until he received an honorable discharge on October 28, 1948 (*id.* at 2a, 6a). Within 30 days, Bunnell returned to his civilian employer and continued to work there until Brock Hall Dairy was purchased by Knudsen Brothers Dairy on April 26, 1974 (*id.* at 6a). Bunnell then continued to work for Knudsen until his retirement on January 1, 1978 (*ibid.*).

Respondent Bunnell, like other Brock Hall employees, was represented by Local 677 of the Teamsters Union beginning in 1949 (Pet. App. 6a). In 1958, Bunnell's union and employer entered into a collective bargaining agreement pursuant to which the employer became obligated to contribute to, and Bunnell became an employee covered under, an industry-wide pension arrangement, namely petitioner New England Teamsters and Trucking Industry Pension Fund (*id.* at 2a, 6a).[1]

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[1]The New England Teamsters and Trucking Industry Pension Fund Agreement and Declaration of Trust was executed on April 11, 1958, and is attached as Addendum A to respondent Bunnell's brief in the court of appeals. Under the terms of this Agreement, the Pension Fund is to be operated and administered by eight trustees—four of whom are to be appointed by the participating employers and four of whom are to be appointed by the participating unions (Art. III, Sec. 1). The trustees are expressly empowered under the Agreement "[t]o establish and administer a pension Plan on behalf of the Employees and their beneficiaries * * *" (Art. IV, Sec. 3(a)) and are vested with "full authority to determine eligibility requirements for benefits and to adopt rules and

On September 6, 1974, respondent Bunnell applied to the Pension Fund for an early retirement, "minimum thirty year service pension" to commence on May 1, 1975 (Pet. App. 6a). If Bunnell had received credit for all of his time spent in military service, he would have been eligible for the 30-year service pension in December 1974 (*ibid.*). But Bunnell was refused credit for his three years of voluntary enlisted service, from December 1945 through October 1948, because of a provision in the Pension Plan (Art. III, Sec. 6) allowing past service credit only for "active military service during World War II and the Korean Conflict" (Pet. App. 2a & n.2, 6a). Thus, Bunnell was granted past service pension credit for his year of military service as an inductee during World War II, but was denied such credit for his three years of voluntary military service as an enlistee after the war ended (*id.* at 2a, 6a). Accordingly, he was required to work three more years, until January 1, 1978, to qualify for the 30-year service pension (*id.* at 4a, 6a).

2. Bunnell instituted this suit in 1977 against petitioner and his employer, respondent Knudsen Brothers Dairy, to challenge this denial of past credit for military service—and the consequent denial of pension benefits prior to January 1978—as a violation of his rights under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* (Pet. App. 5a-6a).[2] Petitioner moved to dismiss

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regulations setting forth same which shall be binding on the employees and their beneficiaries" (Art. VI, Sec. 3). Moreover, the trustees are granted "power to construe the provisions of this Trust Agreement, or the Plan adopted hereunder, and the terms thereof * * *," and the trustees' interpretation is to be accorded binding effect on the unions, employers and employees (Art. IV, Sec. 2). The Agreement further provides that "[t]he financial liability of any Employer shall in no event exceed the obligation to make contributions as set forth in its applicable collective bargaining agreement with the Union or Unions" (Art. VI, Sec. 7).

[2]The Department of Justice represents respondent Bunnell pursuant to 38 U.S.C. 2022.

Bunnell's complaint on the theory that the Act permitted him to name as a defendant only his actual employer, Knudsen (*id.* at 7a). Bunnell then cross-moved for summary judgment, and Knudsen opposed on the ground that it had made all the required contributions to petitioner, which was solely responsible for the decision to deny Bunnell pension credit and benefits for three years of military service (*ibid.*). The district court ruled for Bunnell and held that, under the circumstances of this case, primary liability should rest on petitioner rather than on Knudsen (*id.* at 18a-19a). Accordingly, the court entered judgment for Bunnell for monthly pension benefits retroactive to May 1, 1975.

Petitioner appealed, and the court of appeals affirmed (Pet. App. 1a-4a).[3] It held that a veteran's seniority rights in connection with pension benefits are guaranteed to voluntary enlistees as well as inductees, citing *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977) (Pet. App. 2a-3a). The court of appeals did not find it necessary to reach the question whether the Pension Fund may be deemed an "employer" or "successor in interest" within the meaning of 38 U.S.C. 2021(a)(B)(i) (Pet. App. 3a). Rather, the court simply held that it was a violation of the Act to deny pension credit to reinstated veterans for time spent in military service. Because the Pension Fund participated in this pension-paying arrangement and applied the employer's contributions "to enure to the benefit of non-veteran employees and discriminate against veterans" (*ibid.*), the court concluded that the Fund could be sued to remedy the violation.

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[3]While the appeal was pending, Knudsen filed a "Suggestion of Bankruptcy," prompting the court of appeals, by order of May 27, 1980, to stay all proceedings pursuant to Rule 11-44 of the Bankruptcy Rules. Subsequently, on Bunnell's motion, the court of appeals vacated the stay by order of March 12, 1981, and allowed the appeal to proceed.

ARGUMENT

The court of appeals' decision is correct, presents no conflict with decisions of this Court or any other court of appeals, and poses no significant question of federal law requiring this Court's attention. Accordingly, further review is unwarranted.

1. Petitioner does not dispute that, under *Alabama Power Co.* v. *Davis, supra,* respondent Bunnell would be entitled to full pension credit for all his years of military service if his pension benefits were administered directly by his employer. Petitioner argues, however, that a different result is required here, because Bunnell's employer entered into a collective bargaining agreement with the union pursuant to which the employer's employees are covered by a multi-employer pension fund established under Section 302 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 186, and subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Such a distinction, however, would allow easy circumvention of the important veterans' seniority rights protected under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, and would run directly counter to the overriding congressional intent that a returning veteran not be "penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

This Court has consistently recognized that the veterans' reemployment rights provisions are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." See, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* 328 U.S. at 285. See also *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Tilton* v. *Missouri Pacific R.R.*, 376 U.S. 169, 181 (1964). Moreover, the Court has explicitly stated that

"no practice of employers or agreement between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* 328 U.S. at 285. See also *Alabama Power Co.* v. *Davis, supra,* 431 U.S. at 584-585; *Accardi* v. *Pennsylvania R.R.,* 383 U.S. 225, 229 (1966). Thus, the court of appeals correctly concluded that Bunnell's right under the Act to obtain redress for the unlawful denial of his pension credit could not be defeated by the arrangement between his employer and union whereby the Pension Fund was designated to assume responsibility for his pension rights and benefits, and, in addition, that relief could be obtained from the Pension Fund.[4] Clearly, a veteran's ability to vindicate his statutory right cannot be dependent on the fortuity whether the employer has delegated its pension-paying functions to an independent multi-employer pension fund.[5]

2. Petitioner's contention (Pet. 4-5) that this case conflicts with this Court's decision in *NLRB* v. *Amax Coal Co.,* No. 80-692 (June 29, 1981), is without merit. *Amax* involved the question whether the employer-selected trustees of a pension trust fund created under Section 302(c)(5) of the LMRA, 29 U.S.C. 186(c)(5), are "representatives" of the employer "for purposes of collective bargaining or the

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[4]Although this issue has not been squarely addressed by any other court of appeals, there are at least two reported cases in which veterans have successfully maintained actions against the organization that administers their employer's pension plan. See *Von Allmen* v. *Connecticut Teachers Retirement Board,* 613 F. 2d 356 (2d Cir. 1979); *Smith* v. *Industrial Employers & Distributors Association,* 546 F. 2d 431 (9th Cir.), cert. denied, 431 U.S. 965 (1977).

[5]Relief here against the employer alone would, at best, be ineffective and incomplete. Respondent Knudsen has no power to make pension payments out of the Pension Fund's monies, and it has no authority directly to confer credit, *i.e.,* pension rights, in the Fund.

adjustment of grievances" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(B). Explaining that such employer-selected trustees are not employer "representatives" under the NLRA, the Court emphasized that the trustees are required to act as fiduciaries under standards made explicit in ERISA. Slip op. 5-10. Accordingly, the Court held that a union does not commit an unfair labor practice when it exerts economic pressure to induce an employer to participate in a multi-employer pension fund.

Amax is plainly inapposite to this case. The court of appeals addressed only the Pension Fund's responsibility to administer its pension plan in a manner that does not disadvantage veterans in violation of the Vietnam Era Veterans' Readjustment Assistance Act. It is not contested here that the Pension Fund trustees are fiduciaries, independent of employer control in the exercise of their fiduciary responsibilities and obliged to act solely in the interest of the pension plan's participants and beneficiaries in accordance with ERISA. But the trustees' independence and fiduciary responsibilities under ERISA do not free them to ignore the veterans' reemployment rights provisions or to limit a veteran's ability to seek vindication of those rights. Indeed, ERISA expressly provides that, with certain exceptions not applicable here, nothing in that Act "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law." 29 U.S.C. 1144(d). And the Department of Labor regulations promulgated under ERISA unmistakably contemplate the availability of pension credit for time spent in military service. See 29 C.F.R. 2530.200b-2(d), (e).[6]

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[6]The regulations contain this specific example: "During a [pension] computation period, an employee worked 40 hours a week for the first 2 weeks. The employee then began serving on active duty in the Armed

3. Petitioner contends (Pet. 11-12) that the court of appeals erred in upholding the award to respondent Bunnell of retroactive pension payments for the period during which he continued to work after the Fund erroneously informed him that otherwise he would not qualify for a 30-year service pension. This contention is insubstantial, and it was correctly rejected by the courts below (Pet. App. 4a, 20a).

The Act expressly empowers the courts to require that a veteran be fully compensated "for any loss of wages or benefits suffered by reason of [the] unlawful action." 38 U.S.C. 2022. Moreover, the "legislation's overall purpose" dictates that "the veteran should be made whole, and reimbursed for the measurable wage disadvantage or loss suffered through his incorrect reinstatement." *Helton* v. *Mercury Freight Lines, Inc.*, 444 F. 2d 365, 367 (5th Cir. 1971). The remedy here clearly was appropriate. Although respondent Bunnell could not be made entirely whole, because he could not recoup the three years that he continued to work rather than risk the loss of his pension benefits, he should at least be paid—as of the date that he would otherwise have

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Forces of the United States, which service occupied the remaining 50 weeks of the computation period. The employee would be credited with 80 hours * * * plus such credit as may be prescribed by separate Federal laws relating to military service. The nature and extent of the credit that the employee receives upon his return and the purpose for which such credit is given, e.g., the percentage of his or her accrued benefits derived from employer contributions which are nonforfeitable (or vested), will depend upon the interpretation of the Federal law governing veterans' reemployment rights." 29 C.F.R. 2530.200b-2(e)(6).

received them—the pension benefits wrongly denied him by the Pension Fund.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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[7]Petitioner also argues (Pet. 6-11) that this case presents an important issue of federal law that should be settled by this Court, *i.e.*, whether the Pension Fund may be deemed Bunnell's "employer" or his employer's "successor in interest" within the meaning of 38 U.S.C. 2021(a)(B)(i). Petitioner concedes (Pet. 6) that this question was not reached by the court below. Moreover, petitioner does not explain why this question is of such importance that it requires review by this Court. Indeed, it appears that the district court below is the only court that has considered this question, and the court of appeals subsequently found that it had been unnecessary to do so (Pet. App. 3a).

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